

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

ROBERT TROY MCCLURE §  
VS. § CIVIL ACTION NO. 9:16-CV-53  
JUAN A. TORRES, *et al.*, §

**MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO  
DISMISS MAGISTRATE JUDGE**

Plaintiff, Robert Troy McClure, an inmate currently confined at the Robertson Unit with the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se and in forma pauperis*, filed this civil rights action pursuant to 42 U.S.C. § 1983 against defendants Thorp, Holderreith and Livingston.

Plaintiff filed a Motion to Intervene on October 27, 2017 (docket entry no. 23). A careful review of this motion reveals that plaintiff is moving to vacate the order referring this case to Magistrate Judge Zack Hawthorn. As such, the court liberally construes this motion as a Motion to Dismiss Magistrate Judge Hawthorn. For the reasons outlined below, the motion is denied.

Background

On March 23, 2016, Magistrate Judge Keith Giblin entered an order in Civil Action Number 9:15cv130, severing plaintiff's claims against defendant Lieutenant Torres (docket entry no 1).<sup>1</sup> These claims were severed into the above-referenced civil action number and the case was referred

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<sup>1</sup>In the order, Judge Giblin noted plaintiff raised a new complaint concerning an alleged assault by a Lieutenant Torres on October 27, 2015 at the Eastham Unit. At the time of mailing this complaint, plaintiff was still incarcerated at the Eastham Unit on October 28, 2015 and alleged his life was in danger (docket entry no. 14).

to United States Magistrate Judge Hawthorn on that same day. Plaintiff filed a consent to proceed before the U.S. Magistrate Judge on April 14, 2016 (docket entry no. 3) and a motion for leave to file an amended complaint (docket entry no. 4). In the motion for leave to file an amended complaint, it was noted that plaintiff had been transferred to the Stiles Unit. *Id.*, pg. 2. Plaintiff's motion for leave to file amended complaint was granted on August 17, 2016 (docket entry no. 6) and the Amended Complaint was filed on the same day (docket entry no. 7). In the amended complaint, plaintiff added claims against defendants Thorp, Holderrieth and Livingston surrounding the same events involving Lieutenant Torres at the Eastham Unit, in addition to adding a request for damages.

A Report and Recommendation was entered on March 16, 2017, recommending plaintiff's claims against defendants Thorp, Holderreith and Livingston be dismissed without prejudice pursuant to 28 U.S.C. § 1915(g) as plaintiff was no longer in imminent danger of serious physical injury with respect to these defendants *at the time he filed his amended complaint* (docket entry no. 11). On that same day, an order for defendant Torres to answer was entered (docket entry no. 12). In response to the order to answer, the Office of the Attorney General, as Amicus Curiae, filed a Motion to Revoke Plaintiff's *In Forma Pauperis* status as it relates to his claims against defendant Torres (docket entry no. 15).

This Court never received objections to the Report and Recommendation entered March 16, 2016. A Memorandum Opinion and Order Adopting the Report and Recommendation and Partial Judgment were entered on May 11, 2017 (docket entry nos. 17 & 18).

Plaintiff then filed a Motion for Default Judgment on June 22, 2017 (docket entry no. 20), a Motion for Relief from Judgment on June 27, 2017 (docket entry no. 21), and then the current Motion to Intervene on October 27, 2017 (docket entry no. 23). Magistrate Judge Zack Hawthorn

entered a Report and Recommendation on November 6, 2017, recommending plaintiff's Motion for Default Judgment be denied (docket entry no. 24).

Discussion

Plaintiff complains Judge Hawthorn erred in recommending plaintiff's claims against defendants Thorp, Holderreith and Livingston be dismissed as plaintiff did not meet the imminent danger exception at the time he filed his amended complaint. In addition, plaintiff complains Judge Hawthorn has erred in "delaying" a ruling on the Motion to Revoke Plaintiff's *In Forma Pauperis* Status filed by the Office of the Attorney General as Amicus Curiae. A review of the docket in this matter, however, reveals no delay and the orders entered by the Magistrate Judge are neither clearly erroneous nor contrary to law.

ORDER

**ORDERED** that plaintiff's Motion to Dismiss the Magistrate Judge (docket entry no. 23) is **DENIED**.

**So Ordered and Signed**

Dec 1, 2017



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Ron Clark, United States District Judge